IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14/11/2003

Coram

The Honourable Mr.Justice F.M.IBRAHIM KALIFULLA

W.P.No.21591 of 2000 and W.P.No.21617 of 2000

The Management of
Melur Co-operative Urban Bank Limited,
317, Alagar Koil Road,
Melur-625 106,
Madurai District. .. Petitioner in
Both Writ Petitions

-Vs-

1. The Deputy Commissioner of Labour
(Appellate Authority under Tamil Nadu
Shops and Establishments Act)
5/2, Kutturavu Malligai,
Indira Nagar, Anna Nagar East,
Madurai-29. ..1st Respondents in
Both Writ Petitions
2. S.Ashok Kumar ..2nd Respondent in
W.P.No.21591 of 2000
3. K.Raja ..2nd Respondent in
W.P.No.21617 of 2000

Petitions under Article 226 of the Constitution of India
praying to issue a writ of Certiorari, for the reasons as stated therein.

!For Petitioner : Mr. Vijay Narayan

For Respondent : Mr.Mr.R.Viduthalai, SC for
Mrs.A.V.Shanthi for R2
Ms.D.Malarvizhi for R1

:COMMON ORDER

The challenge in these Writ Petitions are to the orders of the
first respondent dated 7-8-2000 in TNSE 14 and 15 of 2000.
2. The above said impugned orders came to be passed by the
first respondent in the appeals preferred by the respective second respondents
herein under Section 41(2) of the Tamil Nadu Shops and Establishments Act,

1947 (hereinafter called, 'the Act').
3. While the second respondent in W.P.No.21591 of 2000 came to be appointed as Junior Assistant on 31-8-1998, the second respondent in W.P.No.21617 of 2000 came to be appointed on daily wage basis as an Office Assistant from 19-8-1998. Subsequently, the second respondent in W.P.No.21591 of 2000 was issued with an order dated 31-5-1999 placing him under regular time scale of pay with effect from 1-6-1999 , whereas, the second respondent in W.P.No.21617 of 2000 was issued with an order dated 31-5-1999 fixing his consolidated pay from 1 -6-1999 and thereafter, he was issued with an order placing him under regular time scale with effect from 1-9-1999. Both the second respondents were issued with a show cause notice dated 20-3-2000 by the petitioner pointing out that while their services came to be regularised with effect from 1-6-1999, the audit report of the year 1998-99 pointed out that their appointments came to be made without prior permission of the Cooperative Department and therefore, since their employment was irregular, their services are liable to be terminated with effect from 31-3-2000. They were called upon to submit their explanation within seven days. By an identical order dated 31-3-2000, their services came to be terminated with effect from the said date.
4. Aggrieved against the orders of termination, both the second respondents filed the appeals before the first respondent under Section 41(2) of the Act, which came to be allowed by the first respondent by its respective orders dated 7-8-2000 holding that the order of termination was in violation of Section 41(1) of the Act, and therefore, was liable to be set aside. In fact, the first respondent directed the petitioner to reinstate the respective second respondents with back wages and continuity of service within thirty days from the date of receipt of copy of its order.
5. Aggrieved against the above orders of the first respondent, the petitioner has come forward with these Writ Petitions.
6. In both the Writ Petitions, the common question that arises for consideration is whether an irregular appointment of the respective second respondents in the petitioner's society would entitle them to invoke the jurisdiction of the first respondent under Section 41(2) of the Act?
7. Mr.Vijay Narayan, learned counsel appearing for the petitioner placed reliance upon the decision of his Lordship Mr.Justice E. Padmanabhan reported in 2003 Wr.L.R.273 (TINDIVANAM CO-OPERATIVE HOUSING SOCIETY LIMITED, REP. BY ITS SPECIAL OFFICER, TINDIVANAM versus THE DEPUTY COMMISSIONER OF LABOUR, CHANNAI AND ANOTHER) and the First Bench decision of this Court reported in 2002(4)CTC 385 (L.JUSTINE AND ANOTHER versus THE REGISTRAR OF COOP.SOCIETIES, CHENNAI)in support of his submissions. Alternatively, the learned counsel contended that even if it were to be held that the appeal under Section 41(2) of the Act was maintainable, when the irregularity in the appointment would justify the order of the termination, the non payment of one month notice pay would not by itself vitiate the order of termination and at best, the liability on the petitioner would only be payment of wages from the date of termination till such payment is made. The learned counsel pointed out that while granting interim stay of the orders of the first respondent impugned in the Writ Pettiions, the petitioner was directed to pay wages of both the second respondents for the period from April 2000 to January, 2001 with in a period of four weeks and that the said order was also duly complied with. In support of the said submission reliance was

placed upon the judgment of the Division Bench reported in 1975 (1) LLJ 159 (STATE BANK OF INDIA, REP. BY THE AGENT, COONOOR BRANCH versus THE ADDITIONAL COMMISSIONER FOR WORKMEN'S COMPENSATION AND ANOTHER) as well as the one reported in 1987(2) LLN 301 (K.R.KRISHNAMURTHI & OTHERS versus MANAGEMENTOF MADURAI SOUIRASTHRA CO-OPERATIVE BANK, LTD., MADURAI AND ANOTHER). In both the Division Bench Judgments, it has been held that where a reasonable cause is found, if the statutory notice had not been given or the wages in lieu thereof was not paid, the wages due to the employee up to date including notice pay will have to be paid and that that would cure the said defect.

8. Per contra, Mr.R.Viduthalai, learned counsel appearing for the respective second respondents contended that Section 2(12) of the Act only defines a 'person employed' and it does not make a distinction between the 'person employed by way of regular appointment or irregular appointment' and therefore, such a distinction cannot be imported in a case arising under Section 41 of the Act. The learned Senior counsel further contended that the only irregularity in the case of the respective second respondents was that their names were not sponsored through Employment Exchange, though they had valid registration at the respective point of time and that the said irregularity cannot be a ground after the issuance of G.O.Ms.No.86 dated 12-3-2001 since the said G.O. directed regularisation of all the personnel appointed to the Cooperative Society regardless of non-drawal of persons from Employment Exchange or want of vacancy or want of educational and other qualifications in respect of those who came to be appointed between 9-7-1980 to 11-3-2001. The learned counsel, therefore, contended that in the Division Bench Judgment also, namely, the one reported in 2002 (4) CTC 385 (cited supra), the said position having been accepted and inasmuch as, the appointment of the respective respondents came to be made during the period covered by the above said G.O., the said irregularity can no longer be a cause for termination. According to him, as the termination order was subsequently set aside by the first respondent on 7-8-2000, the benefit of the Division Bench judgment by placing reliance upon G.O.Ms.No.86 dated 12-3-2001 would enure to the benefit of the respective second respondents. The learned counsel made reference to the Judgments reported in 1986(2) LLJ 492 (ERANALLOOR SERVICE COOPERATIVE BANK LTD. Versus LABOUR COURT AND OTHERS); 1994(2) LLJ 97 (KOODARANJI SERVICE CO-OP.BANK versus M.M.LISSY & OTHERS); 1996(2) LLJ 216 (THE PRESIDENT, SRIRANGAM CO-OPERATIVE BANK LTD., versus THE PRESIDING OFFICER, LABOUR COUIRT, MADURAI AND ANOTHER); 2001(1) LLJ 542 (MANAGEMENT O-322 KOVILPATTI CO-OPERATIVE MARKETING SOCIETY, KOVILPATTI versus PRESIDING OFFICER, LABOUIR COURT, TIRUNELVELI AND ANOTHER); 1996 (2) LLJ 216 (THE PRESIDENT, SRIRANGAM CO-OPERATIVE URBAN BANK LTD. Versus THE PRESIDING OFFICER, LABOUR COUIRT, MADURAI AND ANOTHER); 1990(2) LLJ 70 (PUNJAB LAND DEVT. & RECLAMATION CORPN. LTD., CHANDIGARH ETC. AND SEVARAL OTHERS versus PRESIDING OFFICER, LABOUR COURT, CHANDIGARH AND SEVERAL OTHERS); and 2002(2) LLJ 754.

9. On behalf of the petitioner, reliance was also placed upon apart from 2003 Wr.L.R.273 and 2002(4) CTC 385 (cited supra), 1998 (9) SCC 258 (MUNICIPAL CORPORATION, BILASPUR AND ANOTHER versus VEER SINGH RAJPUT AND OTHERS); 2000(1) LLN 1129 (K.R.KRISHNAMURTHI AND OTHERS versus MANAGEMENT OF MADURAI SOURASHTRA CO-OPERATIVE BANK LTD., AND ANOTHER) and 2001 (1) LLN 378 (MANAGEMENT, SALEM CO-OPERATIVE HOUSING SOCIETY, LTC., SALEM versus PRESIDING OFFICER, LABOUR COURT, SALEM AND OTHERS).

10. In the judgment reported in 2003 Wr.L.R. 273, the concerned workman was appointed in the Co-operative Society without permission from the Registrar as contemplated in Rule 149 of the Tamil Nadu Cooperative Societies Act and without consulting the Employment Exchange. The learned Judge followed the First Bench judgment of this Court reported in 2002(4) CTC 385 and held as under in para 12:

"12. The remedy of appeal could be invoked under Section 41 of the Shops and Establishments Act if there is a valid appointment. If the appointment itself is illegal or void, it will not confer any right. In respect of such illegal appointment no right accrue to the individual to the post and, therefore, no question of issuing a show cause notice or holding an enquiry or giving a reason would arise. The very appeal of the 2nd respondent under Section 41(2) is not maintainable. The 2nd respondent not being a valid appointee by the competent authority and his appointment being not in accordance with the by-laws of the society as well as the Co-operative Societies Act, it follows automatically that the appointment of the 2nd respondent being non est and illegal, no right accrues to him and, therefore, invocation of Section 41(2) of the Shops and Establishments Act by the 2nd respondent itself is without jurisdiction."

11. In the judgment reported in 1998(9) SCC 258, the Honourable Supreme Court has observed as under in para 3.

"3. ... One such problem relates to irregularities in appointments. Candidates who are sought to be regularised may be neither sponsored by the employment exchange nor appointed after issuing a proper advertisement calling for applications. "In short, it may be a backdoor entry. A direction to regularise such appointments would only result in encouragement to such unhealthy practices." In the present case, the stand of the appellant-Corporation throughout has been that these daily-rated employees have been appointed because of political considerations by the Standing Committee. After the Standing Committee was superseded and Administrator was appointed, serious irregularities were discovered in these appointments. In this situation, a direction given by the High Court for regularisation of such persons is not warranted. ...."

12. In 2001(2) LLN 1129, His Lordship Mr.Justice R.Jayasimha Babu, has held in para 7 as under:

"7. Respondent is a Co-operative Society governed by the provisions of the Tamil Nadu Co-operative Societies Act and Rules made thereunder. It has o option but to conform to the requirements of the statutory provisions or the rules. By acting contrary to those provisions it cannot create a situation where the authorities under the Act are compelled to treat what is not permissible. Rule 149(2) of the Rules made under that Act requires that all appointments be made through the Employment Exchange. Societies cannot by making appointments, without resorting to the exchange, claim as a right that such appointees be retained as employees of the society, even when the Rules which apply to the societies require that recruitment be made through exchange."

13. Similar view has been expressed by His Lordship Mr.Justice P. Sathasivam in the judgment reported in 2001(1) LLN 378.

14. In the Judgment of the Division Bench of Kerala High Court reported in 1994(2) LLJ 97, while dealing with a case of daily rated

employee reliance was placed upon the ratio of the Hon'ble Supreme Court reported in 1962(1) LLJ 213 (WORKMEN versus BANGALORE W.C. & S.MILLS CO.), wherein, the Hon'ble Supreme Court was pleased to state the law as under:-

"It seems to us that a service cannot be said to be terminated unless it was capable of being continued. If it is not capable of being continued, that is to say, in the same manner in which it had been going on before, and it is, therefore, brought to an end, that is not a termination of the service."

15. In the judgment reported in 2000(4) CTC 485 (A.SENTHILKUMAR versus THE DEPUTY REGISTRAR OF CO-OPERATIVE SOCIETIES, THANJAVUR AND TWO OTHERS), His Lordship Mr.Justice P.D.Dinakaran in the context of Rule 149(2) of the Tamil Nadu Co-operative Societies Rules, has held as under in para 5.

"5. In my considered opinion, in the matter of illegal appointment, which is contrary to statutory provisions, viz., Rule 149(2), no opportunity is required to be given to the petitioner, as to estoppel could be claimed against the statute. Hence, the writ petition fails and the same is dismissed. No costs. Consequently, WMP Nos.18321 and 18322 of 2000 are also dismissed."

16. In the judgment reported in 1996(2) LLJ 216 (cited supra), the Division Bench of our High Court has taken a view that in the case of a daily rated employee in a Co-operative Society, the contentions based upon the by laws and the circular of the Registrar cannot be applied and therefore if the concerned daily rated employee has worked for 280 days in a year, his termination without complying with Section 25(F) of the Industrial Disputes Act would render the termination in valid. So holding, the Division Bench upheld the order of the learned Single Judge who set aside the order of termination. The Division Bench, however, ultimately, held that since the concerned workmen were working on daily wage basis and when the termination has been found to be in violation of Section 25(F) of the I.D.Act, the direction for reinstatement should only be to the effect that the workmen should be reinstated in the same position and in the same nature of employment which he was enjoying on the date of termination.

17. In the Judgment reported in 2001(1) LLN 542, I followed the Division Bench judgment or our High Court reported in 1996(2) LLJ 216, as in that case, it related to non-employment of temporary employee, which non-employment was found to be not justified by the Labour Court on the ground that the society failed to comply with Section 25(F) of the I.D.Act.

18. Mr.R.Viduthalai, learned Senior counsel also relied upon the Division Bench judgment dated 31-8-2000 in W.A.No.1545 of 1999, wherein, the Division Bench, while testing the correctness of the order of the learned Single Judge in holding that an employee who secured employment without getting his name sponsored through Employment Exchange and thereby got himself appointed by way of a back-door entry was not entitled to be heard before his services were terminated. The Division Bench, while interfering with the order of the learned Single Judge, by following the decision of the Hon'ble Supreme Court reported in 1991 Supp.(1) 330 (SHARAWAN KUMAR JHA & OTHERS versus RAM SEWAK SHARMA & OTHERS), held that, an opportunity should have been given before issuing such an order of termination.

19. In the judgment reported in 2002(4) CTC 385, the First

Bench of this High Court, has elaborately dealt with the case of illegal appointments in the Co-operative Society in the State of Tamil Nadu and has ultimately held that the law laid down by the Hon'ble Supreme Court in the judgment reported in 1997(2) SCC 1 (ASHWANI KUMAR & OTHERS versus STATE OF BIHAR & OTHERS), alone would govern the field. The Division has emphatically held that a case of irregular employment is in contra-distinction to an illegal appointment. Further stating that the regularisation cannot be made in the second type of cases when the initial entry was found to be totally illegal or in blatant disregard of all the established rules governing such recruitment and such illegal appointments can never be regularised. The Division Bench also dealt with the effect of G.O.Ms.No.86 dated 12-3-2001 and held that the said G.O. has got the effect of only authorising the regularisation of the employees recruited by the cooperative societies for the period from 9-7-1980 to 11-3-2001 exempting the intervention of employment exchange.

20. In the back drop of the above said rulings on the core question involved in these Writ Petitions, the point for determination is whether the appointments of the respective second respondents was merely an irregular one or was it wholly illegal which would deprive them of their right even to move the first respondent by way of an appeal under Section 41(2) of the Act?

21. The initial order of appointment issued to both the second respondents by the petitioner merely states that they would be paid a sum of Rs.35/- on the days when they were employed on the daily wage basis from a particular date in the year 1988.

22. In the case of the second respondent in W.P.No.21591 of 2000, a further order came to be issued on 26-12-1998 stating that as per the Managing Committee's resolution No.14, he would be paid a consolidated pay of Rs.1500/- per month from 1-1-1999. Thereafter, another order came to be issued on 31-5-1999 stating that his employment was confirmed as per the Management Resolution No.21 with effect from 1-6-1 999 and that he would be extended with the benefits that are extended to other Junior Assistant. His pay was also fixed in the basic pay of Rs.455/- and that he would earn his next increment from 1-6-2000 and his probation was fixed as one year.

23. In the case of the second respondent in W.P.No.21617 of 2000, after the initial order dated 4-8-1998, providing for engagement of daily wage basis, he was issued with an order dated 31-5-1999 to the effect that he would be paid consolidated wage of Rs.1200/- per month from 1-6-1999 as per the decision taken in the Management Committee's Resolution No.21.

24. Therefore, the above orders by which the respective second respondents came to be employed in the petitioner's society disclose that their appointment was not pursuant to any sponsorship through Employment Exchange nor was their employment made in compliance with Rule 1 49 of the Tamil Nadu Co-operative Societies Rules. None of the above said proceedings disclose that their employment was to any notified vacancy nor by absorbing the regular process of appointments which is normally made in the employment of person in the services of the petitioner society. In other words, the appointment of the respective second respondents cannot be characterised as merely an irregular appointment, but will have to be construed only as an illegal one. If that be the only conclusion that can be reached based on the available documents placed before the first respondent, the question for

consideration is whether they had acquired the status of an employee in the petitioner society in order to maintain their appeal under Section 41(2) of the Act. The emphatic answer to the said question would only be 'No'. If that is the irresistible conclusion to be reached as regards the status of the respective second respondents by virtue of the orders issued by the petitioner to them while allowing them to render service in the petitioner society during the relevant period, going by the well settled proposition of law laid down by the First Bench of this Court in the Judgement reported in 2002(4) CTC 385, and the ratio of the judgment of His Lordship Mr.Justice E.Padmanabhan, in the judgment reported in 2003 Wr.L.R.273, it will have to be held that the appeals preferred by the respective second respondents before the first respondent were not maintainable.

25. As far as G.O.Ms.No.86, dated 12-3-1989 was concerned, it will have to be held that in the first place by the time the said G.O. came to be issued, the second respondents ceased to be in the service of the petitioner. Therefore, the said G.O. providing certain relief to such of those employees who were employed between 9-7-1990 and 11-3-2001 cannot be extended to the respective second respondents. On the date when G.O.Ms.No.86 dated 12-3-2001 came to be issued, as the second respondents lost their status as employees of the petitioner society, there was no scope to apply the benefits conferred under the said G.O. to the respective second respondents. Therefore, in my view, even going by the direction contained in para 19(i) and (v) of the decision of the First Bench judgment reported in 2002 (4) CTC 385, there was no scope to consider the claim of the respective second respondents. Therefore, I am convinced that the decision of the First Bench reported in 2002(4) CTC 385 would squarely apply to the case on hand and that the appointments of the respective second respondents being ilegal in all respects, they had no valid right to invoke the jurisdiction of the first respondent under Section 41 (2) of the Act and the appeals themselves preferred before the first respondent were not maintainable. In other words, the first respondent did not have jurisdiction to deal with the claims of the respective second respondents in the appeals preferred before it.

26. In the light of the decision of the Divison Bench of this Court reported in 2002(4) CTC 385, it will have to held that the ratio of decision of His Lordship Mr.Justice E.Padmanabhan in the judgment reported in 2003 Wr.L.R.273 would apply in all fours to the case on hand. In fact, as compared to the other Division Bench Judgment dated 31 -8-2000 in W.A.No.1545 of 1999, in the case on hand, before issuing the order of termination dated 31-10-2000, the respective second respondents were issued with a show cause notice on 20-3-2000. Therefore, it is not the case where the respective second respondents were not informed of the deficiency in their orders of appointments before their services ultimately came to be terminated by the petitioner.

27. As far as the contention namely, that they were not issued with the necessary statutory notice as contemplated under Section 41, it will have to be held that since the very jurisdiction of the first respondent was lacking to deal with the case of the second respondents in an appeal under Section 41, the question of complying with the notice prescribed therein or payment of salary in lieu of notice does not arise. In other words, when it is held that the respective second respondents had no statutory right to invoke the provision under Section 41(2) of the Act, no legal

infirmity could be attributed to the order of termination on the ground of non compliance of the statutory notice prescribed under the said provision. The earlier Division Bench judgment reported in 1996(2) LLJ 216, which was followed by me in the judgment reported in 2002(1) LLN 596 has no application as this is not a case of engagement of a daily rated employee and that such daily rated engagement came to be dispensed with without following any statutory prescription. Paragraph 4 of the Division Bench judgment reported in 1996(2) LLJ 216 itself made it very clear that the position would be different in the case of an appointment to a regular vacancy by an irregular method. Therefore, the ratio of that decision will have no application to the case on hand.

28. As far as the reliance placed upon the Constitutional Bench judgment of the Hon'ble Supreme Court reported in 1990(2) LLJ 70, it will have to be held that the ratio of the said decision can have no application to the facts of this case. The ratio of the said decision only related to the scope and connotation of the expression ' Retrenchment' under Section 2(oo) of the Industrial Disputes Act and the Hon' ble Supreme Court never dealt with a case of an irregular appointment or an illegal appointment as has been dealt with by the Hon'ble Supreme Court in the judgment reported in 1997(2) SCC 1 (cited supra), which later decision came to be followed by the First Bench of our High Court in the judgment reported in 2002(4) CTC 385, where the issue has been dealt with elaborately and the law laid down to be followed in cases of this kind. The various decisions cited on behalf of the petitioner have taken the consistent view that an irregular or illegal appointment is not an appointment at all and that such a person would not gain any right to challenge when such appointment came to be set at naught and thereby the illegality is erased.

29. In the light of the above said conclusion, it will have to be held that even the payment of salary which came to be made at the instance of the petitioner by securing interim orders from this Court to cover the period between the date of termination up to the date when the Writ Petition came to be filed was not even necessary in the facts and circumstances of the case.

30. Having regard to my above said conclusion, I hold that the respective appeals preferred by the respective respondents before the first respondent under Section 41(2) of the Act were not maintainable and therefore, the ultimate order of the first respondent impugned in the Writ Petitions are non est in law and they are hereby set aside.

In the result, the Writ Petitions are allowed. As far as the payments made pursuant to the interim direction by this Court during the pendency of the Writ Petitions are concerned, it will have to be held that the said payments need not be recovered from the respective second respondents. No costs.

Internet: Yes
Index: Yes

To

1. The Deputy Commissioner of Labour

(Appellate Authority under Tamil Nadu
Shops and Establishments Act)
5/2, Kutturavu Malligai,
Indira Nagar, Anna Nagar East,
Madurai-29.

Suk